SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 606

VIKING PUMP COMPANY,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Subject Index.

A subject index covering this Brief and the petition for writ of certiorari precedes the petition.

The Opinions Below.

The opinion of said Circuit Court of Appeals, which was handed down on July 29th, 1940, in a proceeding entitled *National Labor Relations Board, Petitioner,* v. *Viking Pump Company, Respondent,* had not at the time of the preparation of this petition been officially reported, but is printed in the record (R. 619-625), with rehearing denied September 9th, 1940 (R. 626). The decision and order of the National Labor Relations Board, which is the subject matter of this case, appears in the Record at pages 586-606 and is reported in 13 N. L. R. B. No. 65 (1940).

Jurisdiction.

The judgment of the Circuit Court of Appeals for the Eighth Circuit was entered July 29th, 1940 (R. 625); rehearing denied September 9th, 1940 (R. 626). The statutory provision which is believed to sustain the jurisdiction of this Court is Section 240 of the Judicial Code, as amended by the Act of February 13th, 1925 (28 U. S. C. 347). The cases believed to sustain said jurisdiction are as follows:

National Labor Relations Board v. *Jones & Laughlin Steel Corporation,* 301 U. S. 1, 57 S. Ct. 615; 81 L. Ed. 893,

And companion cases.

Statement of the Case.

This appears at page 1 of the petition for writ of certiorari.

The reasons relied on for the allowance of the writ appear at pages 3 to 5 of the Petition for Writ of Certiorari.

Specifications of Errors to be Urged.

The following specifications of errors are urged in connection with the Reasons relied on for the allowance of the writ as set forth in the Petition for Writ of Certiorari at pages 3 to 5.

(1) The Circuit Court of Appeals erred in holding that it had been established by substantial evidence that the Company had interfered with, restrained and coerced its employees in their right of self organization.

(2) The Circuit Court of Appeals erred in holding that it had been established by substantial testimony that the Company had engaged in unfair labor practice in the alleged illegal discharges of employees Harold Poulson and Ferris Aldrich.

(3) The Circuit Court of Appeals erred in holding that the charge that the Company had been guilty of unfair labor practice in the alleged illegal discharge of Lloyd Siglin had been sustained by substantial evidence.

Argument.

A summary of the facts, together with a statement of the questions presented and the reasons relied on for the allowance of the writ is set forth in the Petition to which reference is hereby made. In our argument on each of the questions presented we will briefly summarize the facts in the respective questions as may be required.

POINT A. The finding and decree of the Circuit Court of Appeals in relation to the matter of the alleged interference by the Company with the right of the employees to join the union of their own choosing, to bargain collectively etc., is not supported by substantial evidence.

Findings of unfair labor practices by the Board must be supported by substantial evidence.

National Labor Relations Board v. *Empire Furn. Co.*, (6 Cir.) 107 F. (2d) 92.

The Act in providing that the findings of the Board as to the facts, if supported by evidence, shall be conclusive, means that such findings, to be conclusive, must be supported by substantial evidence. And the substantial evidence necessary to impart conclusiveness to the findings of the Board is more than a mere scintilla, and is such evidence as a reasonable mind might accept as adequate to support a conclusion.

Consolidated Edison Company v. *National Labor Relations Board*, 305 U. S. 197; 59 S. Ct. 206; 83 L. Ed. 126.

The findings of the Board are conclusive if supported by evidence, which means evidence which is substantial, that is, affording a substantial basis of fact from which the fact in issue can be reasonably inferred.

Cupples Company Mnfrs. v. *National Labor Relations Board,* (8 Cir.) 106 F. (2d) 100.

The rule of substantial evidence is one of fundamental importance and is the dividing line between law and arbitrary power.

National Labor Relations Board v. *Thompson Products,* (6 Cir.) 97 F. (2d) 13;

National Labor Relations Board v. *Empire F. Corpn.,* (6 Cir.) 107 F. (2d) 92.

The respondent (Company) is not bound by statements of its employees unless their positions clearly indicate that their statements are indicative of the respondent's policy.

National Labor Relations Board v. *Sands Mfg. Co.,* 306 U. S. 332; 59 S. Ct. 508; 83 L. Ed. 682.

The provision of the National Labor Relations Act that "any individual employee or group of employees shall have the right at any time to present grievances to their employer" does not inhibit adjustment of individual grievances directly between employee and employer and such procedure is entirely consistent with collective bargaining in matters affecting employees as a class.

National Labor Relations Board v. *Union Pacific Stages,* (9 Cir.) 99 F. (2d) 153.

When a majority of the employees have selected their representative the National Labor Relations Act forbids the employer from negotiating labor contracts with any one else but when a majority have not selected a representative or when there is a fair doubt as to who is the majority rep-

resentative the employer may negotiate with any one willing to confer.

Eastwood-Neally Corpn. v. *International Association of Machinists,* 124 N. J. E. 274 (1 Atl. (2d) 477).

And where there has been no selection, by a majority of employees, of a labor organization as their representative for collective bargaining under the National Labor Relations Act, a minority of employees may make their own choice of a bargaining representative.

Consolidated Edison Company v. *National Labor Relations Board,* 305 U. S. 197; 59 S. Ct. 206; 83 L. Ed. 126.

The Board has urged and the Circuit Court of Appeals found that the petitioner Company called a meeting of the employees in the small pump department. There is no evidence in the record that the Company called any meeting or had anything to do with it. It is manifest that, under their legal and constitutional rights, employees on their own motion may meet and discuss independent union or any union; they may select a committee to wait on the management; and in fact may do anything that any other American citizen may do. A foreman has the authority, and it is his obligation, to direct the employees in the performance of their ordinary duties in the plant, but this does not vest him with the power or authority to bind the company in respect to union recognition or rejection, the formation of a union, or the selection of a committee, or anything aside from the usual routine involved in production or transportation, without special authorization from the management.

In this case there is no evidence that any foreman was vested with any such power by the company. And Harry Petersen, foreman of the small pump department, does not purport to quote the President, Mr. Wyth, and there is no

evidence that he was authorized to speak for him. The only evidence on this subject consists of statements made by foremen, and were but mere expressions of opinion by them, as to what they thought might happen under certain contingencies, and did not necessarily reflect the policy of the company. And this evidence was pure hearsay, rumor and conjecture.

Prior to the time of this meeting there had been no attempt on the part of any union, or any representative thereof, to confer with the management on any subject of interest between the employees and management; and no notice or intimation to the company that any union, or representative thereof, desired to confer with the company. But on account of the unrest and turmoil in the plant, the hatred and ill will between the factions, composed of union sympathizers on the one hand, and those opposed on the other, it was imperative that something be done, though it be of a temporary character, to quell the insurrection in the plant, and allow the orderly procedure of production and transportation to be resumed. The employees had the right to take such action to protect their jobs and their vital interests. This need not interfere with a different organization later on.

The meeting of the men held in the stock room on May 5, 1938, was instituted and controlled by the employees themselves, and was called to order by one Hans Juhl, a mechanical trouble shooter in the factory and the field, having no executive or supervisory right, power or authority whatsoever. And was held for the purpose of composing the differences existing, to alleviate the seething ferment, to restore the morale of the employees, and to allow normal production in the plant to prevail. Juhl was but an employee and could not by his statements bind the company, or subject it to regulatory provisions, unless specifically authorized so to do.

The decision of the court below holds that an employer may be found guilty of unfair labor practices because of isolated acts of a few minor supervisory employees although there was no finding that the employer had authorized, ratified or approved the acts. This language indicates a complete disregard for established rules of agency. In the first place it attaches a quasi-criminal responsibility on the principal for acts of an agent of limited powers, without any proof that the acts were either authorized or approved. In the second place, it presumes to rest responsibility for a violation of the law upon the basis of apparent authority, although the doctrine of apparent authority is based entirely upon principles of estoppel and assumes that there is no actual or implied authority.

The National Labor Relations Act does not abrogate or abridge the right of free speech, and employers, and supervisory and other employees, have the right to express their individual opinions as to unionization and the type or style of union they favor, or that they favor none. And superintendents and foremen may express to employees their preferences in this regard without laying themselves open to the charge of having committed an unfair labor act. In this case the statements of the foremen were only as to individual preferences and not with any intention to bind the company, or to assume any authority with respect thereto.

The men had the right to select a committee to deal with the company in the discussion of grievances, irrespective of any union or organization. And in meeting assembled, and of their own volition, they selected such a committee. The committee met with the management, the result of the meeting was acceptable to the men, the proposal of the committee was adopted, and the committee lapsed. It was but a temporary matter, to meet the exigencies of the time, and need not interfere with any later organization of whatever kind.

The avowed purpose of the act is to prevent any disturbance to the free flow of goods in interstate commerce, and, because of the action taken, as described, the differences among the employees were composed, peace restored, and there was no cessation of activities in the plant of the company, and no interference with interstate commerce.

POINT B. The Circuit Court of Appeals erred in holding that it had been established by substantial evidence that the company had engaged in unfair labor practice in the discharge of one Harold Poulson.

Harold Poulson was a machine operator in the main plant under Frank Cole as foreman. His discharge from the service of the company is claimed to constitute an unfair labor practice. The evidence is that as an employee he insisted on making his own terms before entering on the performance of the work he was ordered to do. And refused to follow the directions of his superior in his production work in the plant.

Moreover, Poulson repeatedly left his machine during working hours in the plant to annoy and harass other employees by urging and insisting that they join the union, and repeatedly threatened that they would lose their jobs if they did not. He continually threatened and abused his fellow employees, and repeatedly told them that if they did not join the union, they would not have any jobs. Complaints of the men to this effect were communicated to the foreman and the superintendent, and after warnings to desist, which were unheeded, Poulson was discharged.

On this branch of the case the proof as to Poulson's participation in such acts is amply supported by the testimony of Gushard (R. 307, 339), Cole (R. 252 to 254, 272 to 276), Vernon Johnson (R. 381, 385), L. W. Sisson (R. 353, 358), Glenn Ward (R. 389, 390, 391), Faye Olmstead (R. 376, 377), Louis Shimpack (R. 404, 405).

POINT C. The Circuit Court of Appeals erred in holding that it had been established by substantial evidence that the company had been guilty of unfair labor practice in the discharge of Ferris Aldrich.

Ferris Aldrich was an inspector in the small pump department of the plant. He was discharged because he solicited memberships in the union during working hours, repeatedly threatened his co-employees that unless they joined the union they would lose their jobs, hid their tools, and spent too much of his time in union organizational work during working hours in the plant, and although warned by his foreman to watch his step, persisted in such conduct. The testimony of Bernard Petersen (R. 371, 372), Earhart Jensen (R. 396-402), Harry Petersen (R. 407, 408), Foster L. Gushard (R. 316, 317), fully substantiate the charges. And his foreman, Harry Petersen, further testified (R. 408) that after his discharge he did not want him back, on account of his actions in the plant.

> The only evidence that could possibly connect his discharge to Union activity is solicitation of members during working hours, and abuse of fellow workers. If so connected, his discharge was not in pursuance of an unfair labor practice.
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> *National Labor Relations Board* v. *Empire Furniture Co.*, (6 Cir.) 107 F. (2d) 92 at 95.

> We have recently pointed out (National Labor Relations Board *v.* Sands Manufacturing Company, (6 Cir.) 96 F. (2d) 721) that the statute does not interfere with the employer's right to discharge for violation of contract, and that discharge is not an unfair labor practice merely because the discharged employee is a member of a union.
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> *National Labor Relations Board* v. *Empire F. Company, supra.*

The jurisdiction to review the orders of the National Labor Relations Board is vested in a court with

> equity powers, and while the court must act within the bounds of the statute and without intruding upon the administrative province, it may adjust its relief to the exigencies of the case in accordance with the equitable principles governing judicial action.
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> *Ford Motor Company* v. *National Labor Relations Board*, 305 U. S. 364, 59 S. Ct. 80, 83 L. Ed. 221.

We submit that the discharges of said Poulson and Aldrich were justified, for the reasons that they had been guilty of acts of insubordination and were insolent and pugnacious, and they had repeatedly left their stations during working hours, to solicit memberships in the union, had threatened and intimidated their fellow employees during working hours in the plant, had attempted to coerce them into joining a particular labor union by abuse and threats; and their discharges for such actions, after warnings from their superiors to desist from such conduct, did not constitute an unfair labor practice on the part of the management.

It is manifest that the Circuit Court of Appeals failed to give consideration to the acts and conduct of Poulson and Aldrich with reference to their endeavors to force their fellow employees to join the union, and to abuse, coerce and intimidate them during working hours in the plant. Inasmuch as Poulson and Aldrich are the real parties in interest, and are seeking redress for supposed wrongs, and as they have not come into a court of equity with clean hands, they are not entitled to the relief they ask, *i. e.*, their reinstatement in the company's plant.

This Court is one with equity powers, and has the right, power, authority and jurisdiction to modify or change the order of the Board, and the decree of the Circuit Court of Appeals, to conform to the law and facts of the case, and to make its order consonant with the circumstances of the

particular transaction, without imposing any onerous burden upon either of the parties, or requiring something to be done which might impede or obstruct the resumption of peaceful relations between employer and employee.

POINT D. The Circuit Court of Appeals erred in holding that it had been established by substantial evidence that the company had engaged in unfair labor practice in the alleged discharge of Lloyd L. Siglin.

In regard to the alleged discharge of Lloyd L. Siglin, the evidence wholly fails to show that Siglin was discharged at all. By consent of the representatives of the Board he was shifted from his position as janitor to a job in the plant. And for the time being was put on temporary work until a place could be made for him on regular work. Thereafter, on account of slack business, he, with sixteen others, was laid off temporarily.

The superintendent testified (R. 402), and his testimony is uncontroverted, that on account of a falling off in orders the company found it necessary to reduce the number of employees in the plant. At first, in order to keep all of the employees at work, it was determined that the hours of work of all of the men should be reduced. Accordingly, on February 1, 1938, working hours per week were reduced from forty-four to thirty-nine. Thereafter, business continued to decline in volume, and it was found necessary to decrease the number of employees. And on March 13th, 1938, seventeen men were laid off, among whom was Lloyd L. Siglin.

POINT E. The Circuit Court of Appeals erred in sustaining the Board's order that the company reimburse the employees Poulson, Aldrich and Siglin for wages lost during the time they were out of the company's employ.

Said decision completely ignores the fact that Poulson and Aldrich were discharged for cause, and that their discharge did not constitute an unfair labor practice. And that Siglin was not discharged, and his temporary lay off did not constitute an unfair labor practice.

POINT F. The Circuit Court of Appeals erred in sustaining the Board's order with reference to the deduction of monies received by said employees during said period for work performed upon Federal, State, county, municipal, or other work relief projects, and to pay over the amount so deducted to the appropriate fiscal agency of the Federal, State, county, municipal or other government or governments which supplied the funds for said work relief projects.

This Court has held, in the case of *Republic Steel Corporation, Petitioner,* v. *National Labor Relations Board and Steel Workers Organizing Committee,* cause No. 14, October Term, 1940, decided on November 12, 1940, and not yet officially reported, except in 85 L. Ed. 1 (Advance Sheets), that such an order is clearly erroneous.

Conclusion.

The desideratum in cases of this kind is to determine the issues pursuant to the record, and enter a decision in accordance with the law and the facts, and, acting within its powers as a court of equity, to render such decree as will protect and conserve the rights of the employees and yet cause as little friction as possible, and such as will encourage the operation of the company's plant in a smooth and efficient manner, without dislocation or trouble.

It is our contention that the Circuit Court of Appeals failed to pass upon decisive points of substance and procedure, and has failed to accord to certain evidence in the record the probative force that its importance merits.

It is therefore respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers, by granting a writ of certiorari, and thereafter reviewing and reversing said decision.

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